



Federal Communications Commission  
Washington, D.C. 20554

September 12, 2007

DA 07-3904

*In Reply Refer to:*

1800B3-MFW

Released: September 12, 2007

Steven A. Roy, Personal Representative,  
Estate of Lyle R. Evans  
c/o Jeffrey F. Jaekels, Esq.  
P.O. Box 22250  
Green Bay, WI 54305

In re : NEW(AM), Escanaba, MI  
Facility ID No. 160560  
File No. BNP-20050118AKH

Motion to Dismiss

Dear Applicant and Counsel:

We have before us: (1) the referenced application (the "Application") of Steven A. Roy, Personal Representative for the Estate of Lyle R. Evans ("Roy") for a new AM station at Escanaba, Michigan, as amended;<sup>1</sup> and (2) the November 9, 2006, "Motion to Dismiss" ( the "Motion") the application filed on behalf of KMB Broadcasting, Inc. ("KMB"), licensee of stations WDBC and WYKX(FM), Escanaba, as supplemented on December 22, 2006.<sup>2</sup> For the reasons set forth below, we treat the Motion as an Informal Objection under Section 73.3587 of the Commission's Rules (the "Rules") and deny it, and we grant the Application.

**Background.** On January 29, 2004, Lyle Robert Evans ("Evans") filed a "short form" FCC Form 175 application for a new AM station in Escanaba, Michigan, during the filing window for AM Auction No. 84 (the "Short Form Application").<sup>3</sup> That proposal specified the following antenna coordinates for both daytime and nighttime facilities: 45° 42' 53" North Latitude, 87° 11' 55" West Longitude (the "Short Form Site").<sup>4</sup> Using these coordinates, the staff determined that the proposal was not mutually exclusive with any other application filed in the Auction No. 84 filing window and directed Evans to file a "long form" application on FCC Form 301 for the Escanaba frequency.<sup>5</sup> Evans timely filed the Application, specifying slightly different antenna coordinates of 45° 42' 8" North Latitude, 87° 12' 10" West

<sup>1</sup> The Application was amended on December 4, 2006, and March 28, 2007.

<sup>2</sup> Roy filed an Opposition to the Motion to Dismiss on May 4, 2007.

<sup>3</sup> File No. BNP-20040129ABD. See *AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze*, Public Notice, 18 FCC Rcd 23016 (MB/WTB, 2003).

<sup>4</sup> See Application No. BNP-20040129ABD, Section III-A, Item 4d.

<sup>5</sup> See *AM Auction No. 84 Singleton Applications*, Public Notice, 19 FCC Rcd 22569 (MB 2004).

Longitude (the “Long Form Site”).<sup>6</sup> On March 6, 2006, Evans died. On November 9, 2006, KMB filed the Motion, arguing that the Application contained numerous defects and should be dismissed. On December 22, 2006, KMB supplemented its Motion, arguing that the applicant did not have reasonable assurance for the site proposed in the Application when it was filed. The Application was subsequently amended on December 4, 2006, to substitute Roy, Evans’ Personal Representative, as the applicant.<sup>7</sup>

**Discussion.** Informal objections must, pursuant to Section 309(e) of the Communications Act of 1934, as amended (the “Act”), provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity,<sup>8</sup>

In the original Motion, KMB states that the Application should be dismissed because it contained incomplete information responsive to questions on the application form (FCC Form 301) regarding submission of: (1) a 7.5-minute United States Geological Survey topographic map of the proposed transmitter site; (2) an antenna site plat listing, among other things, boundary lines and the orientation of antenna ground radials; and (3) aerial photographs of the proposed site.

The Commission, in promulgating procedures for processing applications submitted pursuant to competitive bidding procedures, adopted a “more lenient approach toward the processing of defective applications for new facilities and major changes, employing staff deficiency letters and permitting multiple corrective amendments, if necessary.”<sup>9</sup> In this case, the defects in the original Application alleged by KMB, as well as those identified in a March 9, 2006 staff deficiency letter,<sup>10</sup> are properly characterized as “grantability” rather than “acceptability” matters, as there is no demonstration that the proposal fails to meet the technical rules for AM stations. Thus, even if true, the allegations in the Motion would not result in the dismissal of the Application. Moreover, all of those defects, alleged and identified, were resolved by a December 4, 2006, amendment to the Application that, among other things, proposed relocation to the original site specified in Evans’ Short Form Application.<sup>11</sup> The Application now contains a complete and grantable technical proposal.

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<sup>6</sup> See Application No. BNP-20050118AKH, Section III-A, Item 4d.

<sup>7</sup> The staff approved the substitution of Roy for Evans as the applicant for the Escanaba and three other applications. See *Letter to Denise B. Moline, Esq.*, 21 FCC Rcd 11861 (MB 2006).

<sup>8</sup> See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 note 10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sep. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

<sup>9</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instruction Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15987 ¶ 168 (1998).

<sup>10</sup> See *Letter to Lyle Robert Evans*, Reference 1800B3-EAL (Mar. 9, 2006) (“Staff Inquiry Letter”).

<sup>11</sup> Roy notes that Evans’ estate sought additional time to respond to the Staff Inquiry Letter in light of Evans’ death. Opposition at 3. He also states that the reason for relocating back the original site proposed in the Short Form Application was not the result of KMB’s objections, but rather because the original site owner expressed dismay at learning that Evans had proposed a different site. Roy states that the estate “deemed it prudent to follow Evans’ original intentions and to meet the expectations of the parties in connection with the original site.” *Id.*

In its December 22, 2006, supplement, KMB indicates that the Application contains “another, even more serious, defect”: that Evans did not have “reasonable assurance of the availability of the site specified at the time the Application was filed.”<sup>12</sup> KMB attaches an affidavit from Mr. Thomas King (“King”), Ford River Township Supervisor and Zoning Administrator for the Long Form Site. According to KMB: (1) Evans did not obtain, or even apply for, a Special Use Permit for its proposed towers; (2) if he had applied, Evans would not receive such permit because the two 183-foot towers proposed in the Application<sup>13</sup> violate the township’s 150-foot limit on new communication towers; and (3) “so far as KMB has been able to determine,” Ford River Township has never granted a Special Use Permit for a communications tower of any height.<sup>14</sup>

An applicant seeking a new broadcast facility must, in good faith, possess “reasonable assurance” of a transmitter site at the time it files its application.<sup>15</sup> The specification of a transmitter site in an application is an implied representation that the applicant has obtained reasonable assurance that the site will be available.<sup>16</sup> While some latitude is afforded such “reasonable assurance,” there must be, at a minimum, a “meeting of the minds resulting in some firm understanding as to the site’s availability.”<sup>17</sup> A mere possibility that the site will be available is not sufficient.<sup>18</sup> Although the Commission repealed the requirement that broadcast applicants certify the availability of the transmitter site when it adopted its competitive bidding procedures,<sup>19</sup> the Commission’s basic “reasonable assurance” standard remains unaltered.<sup>20</sup> The instructions to FCC Form 301 underscore this requirement. The Commission also has

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<sup>12</sup> KMB cites to the Instructions for FCC Form 301, which state that “[t]he Commission’s substantive site availability requirements are unchanged. All applicants for broadcast Facilities must have a reasonable assurance that the specified site will be available **at the time they file the FCC Form 301.**” Supplement at 4, citing FCC Form 301, General Instruction K (emphasis in original).

<sup>13</sup> The original long-form Application specified an overall antenna structure height of 60.9 meters for each of two towers. See original Application, Section III-A, Item 4d.

<sup>14</sup> Supplement at 2; Affidavit of Tom King at ¶ 6.

<sup>15</sup> See, e.g., *Port Huron Family Radio, Inc.*, Decision, 66 RR 2d 545 (1989); *Radio Delaware, Inc.*, Memorandum Opinion and Order, 67 RR 2d 358 (1989).

<sup>16</sup> See, e.g., *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974) (“*Wallace*”); *South Florida Broadcasting Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 842 (1984).

<sup>17</sup> *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595 (1988). The applicant need not own the proposed site and may even work out the final details for a lease sometime in the future. The “reasonable assurance” standard is satisfied by “[s]ome clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated....” *Elijah Broadcasting Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990).

<sup>18</sup> See *Wallace*, 49 FCC 2d at 1425.

<sup>19</sup> See *Implementation of Section 309(j) of the Communications Act*, First Report and Order, 13 FCC Rcd 15920 (1998) (“*Auction Order*”).

<sup>20</sup> See *Liberty Productions, A Limited Partnership*, Memorandum Opinion and Order, 16 FCC Rcd 12061, 12084-85 (2001).

repeatedly held that “an applicant will not be permitted to amend where it did not have the requisite reasonable assurance to begin with . . . .”<sup>21</sup>

KMB’s argument regarding the availability of the Long Form Site is without merit. The Commission generally assumes that applicants will be able to obtain local zoning and/or other land use permits and has not generally required applicants to obtain, or apply for, advance zoning approval by local land use authorities in order to certify in their applications that they have reasonable assurance of site availability.<sup>22</sup> The Commission generally has designated site availability issues only where it has been shown that zoning approval already had been, or likely would be, denied by local land use authorities.<sup>23</sup> Here, KMB provides a statement from a member of the Ford River Township Zoning Administrator only to the effect that Ford River Township “has not granted a special use permit nor a variance for any tower over 150 feet in height.” It then speculates that Evans would be denied a special use permit were he to apply for one. This showing falls far short of that proffered in *Teton Broadcasting* and *El Camino Broadcasting, supra*.<sup>24</sup> We find that KMB has not shown that any request by Evans for a special use permit for the Long Form Site likely would have been denied. Additionally, KMB has made no attempt to demonstrate that the now-deceased Evans failed to reach a firm understanding with the owner regarding the availability of the Long Form Site. Accordingly, we find that KMB has raised no substantial and material question of fact calling for further inquiry regarding the availability of the Long Form Site.

**Conclusion/Actions.** We have evaluated the Application, and find it fully compliant with all pertinent statutory and regulatory requirements. We also find that grant of the Application would further the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, that, for the reasons set forth above, the November 9, 2006, Motion to Dismiss filed on behalf of KMB Broadcasting, Inc., as supplemented on December 22, 2006, treated herein as an Informal Objection, IS DENIED.

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<sup>21</sup> See, *Classic Vision, Inc.*, Memorandum Opinion and Order, 104 FCC 2d 1271, 1273 (1986), *review denied*, 2 FCC Rcd 2376 (1987); see also *REM Malloy Broadcasting*, Memorandum Opinion and Order, 6 FCC Rcd 5843 (1991); *Family Broadcasting, Inc.*, Initial Decision, 10 FCC Rcd 3174 (1995).

<sup>22</sup> See, e.g., *Artichoke Broadcasting Corporation*, Memorandum Opinion and Order, 10 FCC Rcd 12631, 12633 (1995).

<sup>23</sup> *Id.*, citing, *inter alia*, *Teton Broadcasting Limited Partnership*, Memorandum Opinion and Order, 1 FCC Rcd 518 (1986) (site availability issue designated where the petitioner had shown that the local zoning board had previously refused to approved the proposed site for a transmitter, that the board’s composition had not changed, and that the board’s chairman had provided an affidavit stating that the board would not reverse its decision) and *El Camino Broadcasting Corp.*, Memorandum Opinion and Order, 14 FCC 2d 361, 352-3 (1968) (site availability designated where petitioner had shown that it had filed with the local land use authority a proposal similar to that specified by the other applicant, and the local land use authority had denied approval of that request).

<sup>24</sup> See also *Edward G. Attsinger, III*, Memorandum Opinion and Order, 29 FCC 2d 443, 449-51 (Rev. Bd. 1971) (site availability issue not warranted on the basis of petitioner’s proffered affidavit of one member of a ten-member local zoning board opining that zoning approval would not be likely); *John Hutton Corp.*, Memorandum Opinion and Order, 27 FCC 2d 214, 215-6 (Rev. Bd. 1971) (site availability issue not warranted on the basis of petitioner’s proffered affidavit of a local land use administrator who stated that he was “pessimistic and discouraging” regarding ultimate zoning approval).

IT IS FURTHER ORDERED, that the application (File No. BNP-20050118AKH) of Steven A. Roy, Personal Representative for the Estate of Lyle R. Evans, for a new AM station at Escanaba, Michigan, IS GRANTED. The authorization is enclosed.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

Enclosure

cc: Denise B. Moline, Esq. (Counsel for Steven A. Roy, Personal Representative)  
James R. Cooke, Esq. (Counsel for KMB Broadcasting, Inc.) (w/o enc.)